INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	2
Argument	4
Conclusion	7
Appendix	8

CITATIONS

Cases:	
Allegrucci v. *United States*, No. 713, this term	5
Conboy v. *First National Bank of Jersey City*, 203 U.S. 141	5
Eastern Produce Co. v. *Benson*, 278 F. 2d 606	7
Goodman v. *Benson*, 286 F. 2d 896	7
Wayne United Gas Co. v. *Owens-Illinois Glass Co.*, 300 U.S. 131	5
Statutes:	
Administrative Procedure Act, sec. 9(b), 60 Stat. 242, as amended, 5 U.S.C. 1008(b)	6, 10
Perishable Agricultural Commodities Act, 46 Stat. 531, as amended, 7 U.S.C. 499a, *et seq.*	2, 5, 8
Sec. 499b(5)	9
Sec. 499h	10
P.L. 842, 84th Cong., 70 Stat. 726, July 20, 1950	6
28 U.S.C. 2101(c)	4, 5
Miscellaneous:	
H. Rep. No. 1196, 84th Cong., 1st Sess., p. 3	6
Rule 26(a) of the Court of Appeals for the District of Columbia Circuit	4
S. Rep. No. 2507, 84th Cong., 2d Sess., p. 4	6

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 744

HARRISBURG DAILY MARKET, INC., PETITIONER

v.

ORVILLE L. FREEMAN, SECRETARY OF AGRICULTURE AND UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit (Pet. App. A) is reported at 309 F. 2d 646.

JURISDICTION

The judgment of the Court of Appeals was entered on October 4, 1962. The petition for a writ of certiorari was filed on January 15, 1963. On January 17, 1963, petitioner moved in the Court of Appeals for leave to file a petition for rehearing out of time. The motion was granted on February 11, 1963 and a petition for rehearing was filed on February 13, 1963. On March 13, 1963, the Court of Appeals denied the

petition. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Secretary of Agriculture was warranted in suspending petitioner's license under the Perishable Agricultural Commodities Act, 7 U.S.C. 499a, *et seq.* on the basis of petitioner's admitted shipment of mislabelled potatoes in interstate commerce.

STATUTES INVOLVED

The pertinent provisions of the Perishable Agricultural Commodities Act, 46 Stat. 531, as amended, 7 U.S.C. 499a, *et seq.*, and Section 9(b) of the Administrative Procedure Act, 60 Stat. 242, 5 U.S.C. 1008(b) are set forth in the Appendix, *infra*, pp. 8–11.

STATEMENT

This case arose from a disciplinary proceeding brought under the Perishable Agricultural Commodities Act, *infra*, p. 8. The Department of Agriculture filed a complaint against petitioner on March 15, 1960 alleging that, during the period from November 1958 through February 1960, petitioner misrepresented the grade or quality of 10 lots of potatoes shipped or sold in interstate commerce, in that the sacks containing the potatoes were marked U.S. No. 1, when in fact the potatoes failed to meet requirements for the U.S. No. 1 grade at the time of shipment.

On March 31, 1961, after a hearing in the Department of Agriculture, the hearing examiner filed a report recommending that petitioner's license be suspended for a period of 21 days. Following con-

sideration of petitioner's exceptions to the report, the Secretary of Agriculture on September 19, 1961, issued an order that petitioner's license should be suspended for a period of 10 days.

The Secretary found, on the basis of the administrative record, that petitioner had made nine shipments of mislabelled potatoes.[1] With respect to two of these shipments, however, the Secretary concluded that the evidence did not show that the mislabelling had been wilful or that appropriate notice of the misbranding had been given petitioner before the filing of the administrative complaint. Accordingly, the Secretary did not consider these instances of mislabelling in fixing the penalty.

With respect to five of the other shipments, adequate notice was found to have been given. In view of that fact, the Secretary concluded that there was a violation of the Act irrespective of the wilfullness of the mislabelling.

The remaining two shipments were found to have involved wilful mislabelling. In one instance, petitioner knew or had reason to know of the mislabelling before the shipment was made. In the other, petitioner had demonstrated a "careless disregard on its part for statutory requirements."

On December 14, 1961, petitioner filed a petition to review the Secretary's order. On October 4, 1962, the Court of Appeals affirmed *per curiam*.

[1] One of the shipments contained two separate lots, each of which was found to be mislabelled. The Secretary considered the shipment of these two lots as one violation.

On January 15, 1963, petitioner filed a petition for a writ of certiorari in this Court. On January 17, 1963, petitioner moved in the court below for leave to file a petition for rehearing out of time. The motion was granted on February 11, 1963 and the petition for rehearing was filed on February 13, 1963. On March 13, 1963, the petition was denied by the Court of Appeals. Subsequently on March 20, 1963, petitioner filed a "Supplement to Petition for a Writ of Certiorari" in this Court asserting the denial of its petition for rehearing as a basis for this Court's jurisdiction over the previously filed petition for certiorari.

ARGUMENT

1. We note, at the threshhold, that the petition appears to be untimely. On October 4, 1962, the Court of Appeals entered its judgment affirming the decision and order of the Secretary of Agriculture. The petition for a writ of certiorari was not filed until January 15, 1963, *i.e.*, more than 90 days after the entry of the judgment of the Court of Appeals. No timely petition for rehearing was filed in the Court of Appeals; nor was an application made by petitioner for an extension of time in which to file a petition for a writ of certiorari.[3] It is thus clear that the

[2] Rule 26(a) of the Court of Appeals for the District of Columbia Circuit allows 15 days after the judgment or decision in which to file a petition for rehearing.

[3] Petitioner's assertion that he obtained an extension from the court of appeals in which to file his petition for a writ of certiorari (Pet. 2) is incorrect. The Court of Appeals is, of course, powerless to grant an extension of time in which to file a petition for certiorari. 28 U.S.C. 2101(c). The action of the court below referred to by petitioner was its

petition for certiorari was not filed within the time specified by 28 U.S.C. 2101(c).

This conclusion is not affected, we believe, by the fact that *after* the untimely filing of the petition for certiorari the Court of Appeals granted leave to petitioner to file an untimely petition for rehearing and then denied the petition. This action by the court below could not, in our view, revive the jurisdiction of this Court to review the October 4, 1962 judgment—a jurisdiction which terminated on January 2, 1963. And, of course, the denial of the petition for rehearing is not itself reviewable.

This Court considered a similar situation in *Conboy* v. *First National Bank of Jersey City*, 203 U.S. 141. There, a petition for rehearing was filed in the Court of Appeals after the expiration of the statutory period for taking an appeal to this Court. The petition was denied and the losing party appealed. This Court, dismissing the appeal, ruled that the right to appeal "had then been lost and appellant could not reinvest himself with that right by filing a petition for rehearing." *Id.* at 145. And see *Allegrucci* v. *United States*, No. 713, this term, petition denied as untimely, March 25, 1963; cf. *Wayne United Gas Co.* v. *Owens-Illinois Glass Co.*, 300 U.S. 131, 137.

2. Even if the petition had been timely filed, review by this Court would not be warranted. The decision below is correct and there is no conflict.

The Secretary of Agriculture found that petitioner mislabelled potatoes in its capacity as a licensee under the Perishable Agricultural Commodities Act.

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order of January 4, 1963 granting a stay in the issuance of its mandate.

Petitioner does not contend that there was no misbranding, but claims that proof of a willful violation is necessary to justify suspension of a license under the Act. As the Court of Appeals noted (Pet. App. A) the legislative history demonstrates the contrary. The Act was amended by Public Law 842, 84th Congress, 70 Stat. 726, July 30, 1956, in order to achieve stricter enforcement by eliminating the requirement of a showing of fraudulent purpose. The amended statute under which these proceedings were initiated requires only proof of a mislabelling in order to sustain a suspension. See H. Rep. No. 1196, 84th Cong., 1st Sess., p. 3; S. Rep. No. 2507, 84th Cong., 2d Sess., p. 4.

Petitioner further complains of procedural infirmities in that it was not granted an opportunity for corrective action after receiving notification of the instances of misbranding. But the Administrative Procedure Act, *infra* pp. 10–11, requires only that the "licensee shall have been accorded opportunity to demonstrate or achieve compliance with all lawful requirements." Since the potatoes were actually out of grade and already shipped in commerce, petitioner was unable to achieve compliance under the Act. Moreover, after having admittedly received notice with respect to the erroneous labelling in five of the shipments (Pet. 18), petitioner was unable to demonstrate that it had complied with the Act. With respect to two other shipments, findings of willfulness by the Secretary were properly based on proof of petitioner's knowledge of mislabelling prior to shipment and the employment of such loose procedure as

to indicate a careless disregard for the requirements of the statute. See *Goodman* v. *Benson*, 286 F. 2d 896, 900 (C.A. 7); *Eastern Produce Co.* v. *Benson*, 278 F. 2d 606, 609 (C.A. 3).

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

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APRIL 1963.

APPENDIX

The Perishable Agricultural Commodities Act, 46 Stat. 531, as amended, 7 U.S.C. 499a, *et seq.*, provides, in pertinent part:

§ 499a. Definitions.

When used in this chapter—

(1) The term "person" includes individuals, partnerships, corporations, and associations;

(2) The term "Secretary" means the Secretary of Agriculture;

(3) The term "interstate or foreign commerce" means commerce between any State or Territory, or the District of Columbia and any place outside thereof; or between points within the same State or Territory, or the District of Columbia but through any place outside thereof; or within the District of Columbia;

(4) The term "perishable agricultural commodity"—

(A) Means any of the following, whether or not frozen or packed in ice: Fresh fruits and vegetables of every kind and character; and

(B) Includes cherries in brine as defined by the Secretary in accordance with trade usages;

(5) The term "commission merchant" means any person engaged in the business of receiving in interstate or foreign commerce any perishable agricultural commodity for sale, on commission, or for or on behalf of another;

(6) The term "dealer" means any person engaged in the business of buying or selling in carloads any perishable agricultural commodity in interstate or foreign commerce, except that (A) no producer shall be considered

as a "dealer" in respect of sales of any such commodity of his own raising; (B) no person buying any such commodity solely for sale at retail shall be considered as a "dealer" in respect of any such commodity in any calendar year until his purchases of such commodity in carloads in such year are in excess of twenty; and (C) no person buying any such commodity for canning and/or processing within the State where grown shall be considered a "dealer" whether or not the canned or processed product is to be shipped in interstate or foreign commerce, unless such product is frozen or packed in ice, or consists of cherries in brine, within the meaning of paragraph 4 of this section. Any person not considered as a "dealer" under clauses (A), (B), and (C) may elect to secure a license under the provisions of section 499c of this title, and in such case and while the license is in effect such person shall be considered as a "dealer." As used in this paragraph, the term "in carloads" includes wholesale or jobbing quantities as defined for any such commodity by the Secretary;

(7) The term "broker" means any person engaged in the business of negotiating sales and purchases of any perishable agricultural commodity in interstate or foreign commerce for or on behalf of the vendor or the purchaser, respectively;

* * * * *

§ 499b. Unfair Conduct; what constitutes.

It shall be unlawful in or in connection with any transaction in interstate or foreign commerce—

* * * * *

(5) For any commission merchant, dealer, or broker to misrepresent by word, act, mark, steneil, label, statement, or deed, the character, kind, grade, quality, quantity, size, pack, weight, condition, degree of maturity, or State,

country, or region of origin of any perishable agricultural commodity received, shipped, sold, or offered to be sold in interstate or foreign commerce;

* * * * *

§ 499h. Grounds for suspension or revocation of license.

(a) Authority of Secretary.

Whenever (a) the Secretary determines, as provided in section 499f of this title, that any commission merchant, dealer, or broker has violated any of the provisions of section 499b of this title, or (b) any commission merchant, dealer, or broker has been found guilty in a Federal court of having violated section 499n (b) of this title, the Secretary may publish the facts and circumstances of such violation and/or, by order, suspend the license of such offender for a period not to exceed ninety days, except that, if the violation is flagrant or repeated, the Secretary may, by order, revoke the license of the offender;

* * * * *

Section 9(b) of the Administrative Procedure Act, 60 Stat. 242, as amended, 5 U.S.C. 1008(b) provides:

(b) In any case in which application is made for a license required by law the agency, with due regard to the rights or privileges of all the interested parties or adversely affected persons and with reasonable dispatch, shall set and complete any proceedings required to be conducted pursuant to sections 1006 and 1007 of this title or other proceedings required by law and shall make its decision. Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, no withdrawal, suspension, revocation, or annulment of any license shall be lawful unless, prior to the institution of agency proceedings therefor, facts or conduct which may warrant such action shall have been called to the atten-

tion of the licensee by the agency in writing and the licensee shall have been accorded opportunity to demonstrate or achieve compliance with all lawful requirements. In any case in which the licensee has, in accordance with agency rules, made timely and sufficient application for a renewal or a new license, no license with reference to any activity of a continuing nature shall expire until such application shall have been finally determined by the agency.